Supreme Court, U.S.
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No. 97-1594

In The

Supreme Court of the United States

October Term, 1997

MAURITS L. DePRINS,

Petitioner,

vs.

WILLY VAN DAMME, TRENDS, N.V., and FRANS CROLS,

Respondents.

On Petition for Writ of Certiorari to the Texas Court of Appeals for the Twelfth Court of Appeals District at Tyler

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In *International Shoe Co. v. Washington,* this Court first announced the jurisdictional requirement that a defendant must have "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. 310, 316 (1945) (citations and quotations omitted). Under this due process standard, is it constitutionally possible for the assertion of jurisdiction to violate fair play and substantial justice, even if the defendant has minimum contacts with the forum?

2. Should the Court overrule its holdings that the Due Process Clause protects the liberty interests inherent in considerations of fair play and substantial justice, in favor of limiting the jurisdictional inquiry to a mechanical minimum contacts rule and relying on the common law doctrine of *forum non conveniens*?

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6, Respondent N.V. Trends Magazine (improperly named as Trends, N.V.) hereby lists the corporate identities related to it: N.V. Roularta Media Group and N.V. European Business Press Group.

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STATEMENT OF THE CASE

Petitioner Maurits DePrins, a citizen and resident of Belgium, sued Respondents Trends, N.V., Frans Crols, and Willy Van Damme, who are also citizens and residents of Belgium. Trends is a corporation that publishes a Belgian periodical called *Trends*. Crols is the editor-in-chief of *Trends*. Although the Petitioner states that Willy Van Damme "is a journalist who was working on an assignment for *Trends*," (Pet. at 2), the record shows that Van Damme was a freelance writer, not a Trends employee, and that he did not receive any instructions or act at the direction of Trends. *See* A. 5, 6; *DePrins v. Van Damme*, 953 S.W.2d 7, 12 (Tex. App. — Tyler 1997, writ denied).

The Petitioner sued the Respondents in Texas state district court for Smith County, claiming Van Damme made slanderous statements in two telephone calls that originated in Belgium and terminated in Texas. Consistent with Texas state practice, Respondents filed special appearances contesting the court's jurisdiction, and subject thereto, moved to dismiss for *forum non conveniens*.

After hearing the evidence and making express findings of fact and conclusions of law, the district court dismissed the case. The court held that none of the Respondents made minimum contacts with Texas and that asserting jurisdiction would violate traditional notions of fair play and substantial justice. The Texas Court of Appeals for the Twelfth Court of Appeals District at Tyler affirmed, largely agreeing with the district court's findings and conclusions.

The petition inaccurately implies that the appellate court held that all three Respondents had minimum contacts with Texas. Pet. at 3. Rather, that court merely stated

> *[f]or purpose of our analysis*, we accept as true that Van Damme did make the allegedly defamatory statements to Texas residents, that he established "minimum contacts" when he did so, and that De Prins' lack of Texas citizenship or residency is not controlling.

A. 15; *DePrins*, 953 S.W.2d at 16 (emphasis added; footnote omitted). The trial court's findings about the lack of minimum contacts of Trends and Crols remain valid and unaltered.[1] In addition, the appellate court did not need to reach the question of whether Van Damme had minimum contacts to support its holding that jurisdiction was not proper.

REASONS FOR DENYING THE WRIT

The Court should deny the writ of certiorari because the Petitioner failed to raise most of the arguments presented in the petition in the Texas state courts. Further, the Texas Court of Appeals' application of traditional notions of fair play and substantial justice, coupled with the Texas Supreme Court's decision to deny review, does not conflict with any other state court of last resort or any decision of this Court. Rule 10(b), (c).

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1. The Petitioner never effectively challenged the evidence concerning the relationship between Van Damme and Trends, or the relationship between Trends and its editor, Crols. Accordingly, the relevant factual findings by the trial court were unimpaired by the appellate court decision. *See Milliken v. Meyer*, 311 U.S. 457, 462 (1940) ("On the findings of the Colorado trial court, not impaired by the Colorado Supreme Court, it is clear that Wyoming had jurisdiction. . . ."). Moreover, the Petitioner never effectively challenged the lack of Texas contacts by Trends and Crols. "The requirements of *International Shoe* . . . must be met as to each defendant. . . ." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

I.

THE PETITIONER DEPRIVED THE TEXAS SUPREME COURT OF THE OPPORTUNITY TO EXAMINE THE SCOPE OF THE TEXAS LONG-ARM STATUTE AND THE TEXAS CONSTITUTION IN THE CONTEXT OF THIS CASE.

The Petitioner raises two new arguments: an attack on the application of the fair play and substantial justice factors in the jurisdictional inquiry, (Pet. at i, 5-12), and a challenge based on the interplay between due process and *forum non conveniens*. (Pet. at 13). Had the Petitioner raised these arguments in the Texas courts, Respondents could have raised additional defenses based on Texas statutory and constitutional law to address them. However, these issues were never addressed by the Texas judiciary because the Petitioner failed to timely raise them.

This case primarily concerns the reach of the Texas long-arm statute and its constitutionality. Tex. Civ. Prac. & Rem. Code § 17.042 (West 1998). The Due Process Clause is a restraint on the reach of the long-arm statute, while the statute itself grants affirmative jurisdictional power. *Helecopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991) (citing *Helecopteros*).

While the Texas Supreme Court has previously stated that the long-arm statute reaches to the limits of due process under the Fourteenth Amendment, that court might have held that the statute was not intended to reach this case based on its unusual facts. *Guardian Royal*, 815 S.W.2d at 226; *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990) (expressly rejecting the "mechanical application of any test," including its own, and

insisting on a case-by-case inquiry to determine the validity of jurisdiction); *see also Helecopteros*, 466 U.S. at 413 n.7 ("It is not within our province, of course, to determine whether the Texas Supreme Court correctly interpreted the State's long-arm statute."). The Texas long-arm statute differs from those in many other states, which expressly provide that jurisdiction is coterminous with the Constitution.[2]

While the Petitioner argues that the Fourteenth Amendment does not require a separate inquiry into "traditional notions of fair play and substantial justice," the Texas Supreme Court may construe the scope of protection afforded by the Texas Constitution's Due Course of Law Clause to require jurisdiction to comport with "fair play and substantial justice," regardless of the United States Constitution's requirements.[3] Texas may expand defendants' rights and need not extend its long-arm jurisdiction to the outermost limits of the United States

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2. *See* Ariz. R. Civ. P. 4.2(a); Cal. Civ. Proc. Code § 410.10 (West 1973); La. Rev. Stat. Ann. § 13:3201 (West 1991); Nev. Rev. Stat. § 14.065 (Michie Supp. 1993); N. J. Ct. R. 4:4-4(e); Okla. Stat. Ann. tit. 12 § 2004F (West 1973); 42 Pa. Const. Stat. Ann. § 5322 (1981 and Supp. 1993); R. I. Gen. Laws § 9-5-33 (West 1998); Tenn. Code Ann. § 20-2-214 (1994 & Supp. 1995); Wyo. Stat. Ann. § 5-1-107 (Michie 1996).

3. *See Schlobohm*, 784 S.W.2d at 358 (stating that the Texas jurisdiction test provides, in part, that the assumption of specific jurisdiction "must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation") (citing *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966)); *see also* Texas Constitution, Art. 1, §§ 3, 19; *Pintor v. Martinez*, 202 S.W.2d 333, 335 (Tex. Civ. App. — Austin 1947, writ ref'd n.r.e.) (holding that a non-Texas citizen was entitled to protections under Texas Constitution).

Constitution. Thus, the Texas Supreme Court could have prevented Texas' reach over this case according to state law, thereby eliminating any constitutional questions for this Court. However, presented only with the question of whether the circumstances of this case satisfied minimum contacts and fair play and substantial justice in the earlier petition for review, the Texas Supreme Court denied review, finding that the Petitioner "present[ed] no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction." Tex. R. App. P. 56(b)(1).

This Court should deny certiorari when arguments were not raised and preserved below, because state courts should be given an opportunity to pass on relevant issues. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In this case, the heart of the petition for the writ of certiorari was never raised or preserved below. This Court should not reach out to take this case now, when the case could have been reviewed and decided on Texas law and public policy grounds.

The only issue preserved for review, whether the Texas appellate court properly applied the "fair play and substantial justice" mandate of the Due Process Clause to this case's particular and unusual facts, has little import to the jurisprudence of this Court or the Texas courts.

II.

FAIR PLAY AND SUBSTANTIAL JUSTICE ARE FUNDAMENTAL COMPONENTS OF THE DUE PROCESS EQUATION AND ARE CONSIDERED THROUGHOUT THE JURISDICTIONAL INQUIRY.

A. *Asahi* properly applies to block jurisdiction in this case.

This Court has held that the exercise of personal jurisdiction must be consistent with the Due Process Clause's inherent commandment of fair play and substantial justice, regardless of whether the defendant has technically sufficient minimum contacts with the forum. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113-15, 116, 121-22 (1987). The Texas Court of Appeals below followed this Court's instructions and found that they would be violated if jurisdiction were exercised. The Petitioner's attack on the court's application of *Asahi* does not withstand scrutiny. *See* A. 16-18, *DePrins*, 953 S.W.2d at 16-17 (rejecting the Petitioner's proposed evaluation of fair play and substantial justice). This Court need not revisit the lower court's analysis and should sustain *Asahi* under the principle of *stare decisis*.

B. The minimum contacts requirement is not equivalent to due process.

The minimum contacts analysis is only one step for protecting due process interests in the context of jurisdiction. The Petitioner asserts that the minimum contacts test described in *International Shoe* completely exhausts the due process protections of the Fourteenth Amendment. On the contrary, that test, when viewed alone, is both under- and over-inclusive. The true *International Shoe* standard is not simply "minimum contacts," but includes the requirement that a defendant

> have certain minimum contacts with [the forum] such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Thus the "minimum contacts" for jurisdiction are defined as those that do not offend fair play and substantial justice. The petition's attempt to pull these phrases apart (and discard fundamental fairness and reasonableness) should fail. The proper standard is highly flexible and fact-bound, and is not reducible to a set of mechanical rules.

This can easily be seen in this Court's decisions. On one hand, exercising jurisdiction may be constitutional in cases involving contacts that would be far less than "minimum" in other circumstances. For example, in *Burnham v. Superior Court of California*, the Court upheld the constitutionality of transient ("tag") jurisdiction, because the practice does not conflict with traditional notions of fair play and substantial justice. 495 U.S. 604, 619 (1990). Thus, minimum contacts may not be a necessary constitutional condition for jurisdiction.

On the other hand, the Court has recognized that the mechanical application of a "minimum contacts" analysis may sweep too broadly to reach rare cases where jurisdiction would offend due process despite the presence of what would, in other cases, be more than minimum contacts. In *Asahi*, despite differing opinions regarding the parameters of the minimum contacts test, the Court recognized that test's potential shortcomings and concluded that principles of fair play and substantial justice inherent in the Due Process Clause ultimately determine whether jurisdiction is constitutional. *Asahi*, 480 U.S. at 113-14 (O'Connor, J., plurality op.), 116 (Brennan, J., concurring in part), 121-22 (Stevens, J., concurring in part).

Accordingly, an affirmative contact determination alone is not a constitutionally sufficient condition for jurisdiction. *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985); *World-Wide Volkswagen*, 444 U.S. at 292.

In *Asahi*, the Court did not restrict its vision to a microscopic evaluation of contacts when determining whether jurisdiction was proper. Justice O'Connor, writing for the plurality, stated, "[t]he strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi *under circumstances* that would offend 'traditional notions of fair play and substantial justice.' " *Asahi*, 480 U.S. at 113 (citing *International Shoe*, 326 U.S. at 316; quoting *Milliken*, 311 U.S. at 463) (emphasis added) (internal quotation omitted). Justice Stevens further explained that

> minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.

Id. at 121-22 (citations omitted).[4] Taking a broad perspective, the Court viewed the contacts in the context of the surrounding circumstances to see if jurisdiction was reasonable and consistent with fair play and substantial justice. The Texas courts below, following in this Court's footsteps, recognized that it was simply not fair or just to haul these foreign parties into court thousands of miles away based on two telephone calls in the context of this case, even if a single telephone call could satisfy the minimum contacts requirement and fairly support jurisdiction in the context of another case.

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4. In nearly parallel language, Justice Brennan agreed with Justices O'Connor and Stevens that the case was "one of those rare cases" where the propriety of jurisdiction was defeated due to inherent notions of fair play and substantial justice. *See Asahi*, 480 U.S. at 116 (Brennan, J., concurring).

The Court has long held that the Due Process Clause, brought to life through traditional notions of fair play and substantial justice, applies to many aspects of jurisdiction — not just minimum contacts — to ensure that constitutionally-mandated liberty interests are adequately protected. This Court identified fair play and substantial justice as the overarching goal years before deciding *International Shoe* and developing the minimum contacts analysis. Indeed, the Court in *International Shoe* relied on *Milliken v. Meyer,* which examined whether procedures for substituted service satisfied the rigors of the Due Process Clause. 311 U.S. 457, 463 (1940) (holding substituted service may satisfy due process if it was reasonably calculated to give actual notice, thereby fulfilling "the traditional notions of fair play and substantial justice implicit in due process are satisfied") (citation omitted). The Court in *Milliken,* in turn, relied on *McDonald v. Mabee,* wherein Justice Holmes wrote that enforceable judgments must be rendered consistently with "natural justice," that legal fictions should not be used to "deny . . . fair play" in respecting the Fourteenth Amendment, and that service of process must be adequate if "substantial justice is to be done." 243 U.S. 90, 91-92 (1917); *cf. Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15 (1950).

C. Due process cannot be measured mechanically.

This Court has repeatedly rejected rigid tests and "conceptualistic theories" that were offered as universal rules to control the constitutionality of jurisdiction. *Burger King,* 471 U.S. at 478 (citing *International Shoe,* 326 U.S. at 319; *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 316 (1943)); *Kulko v. Superior Court of California,* 436 U.S. 84, 92 (1978); *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977).[5] Due process is a

5. The Texas Supreme Court has also rejected "the mechanical application of any test, including the Texas formula." *Guardian Royal,* 815 S.W.2d at 231 (citations omitted).

fluid concept requiring an individualized inquiry and balancing of fairness and substantial justice. While the petition condemns this inquiry as wasteful, unpredictable, and constitutionally untenable, this Court has often required case-specific inquiries to protect constitutional liberty interests and fairness values.[6] The Constitution's protections should not be sacrificed on the altar of promised efficiency.

The wisdom in preserving concepts of "fair play and substantial justice" as a check on the mechanical application of any minimum contacts test is revealed in the current information age and global economy. Neither the authors of the Fourteenth Amendment, nor this Court in 1945, could predict the astounding growth not only in the transportation of people and goods, but also in the transportation of ideas, intellectual property, and speech. Even when contacts fall within the contours of "minimum contacts" found in earlier cases on different facts, cases may arise where fundamental fairness and justice — inherent in the Fourteenth Amendment — preclude jurisdiction. *See Burnham*, 495 U.S. at 622 ("For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether traditional notions of fair play and substantial justice have been offended.") (internal quotations and citation omitted). The Petitioner's plea to jettison these guiding principles risks nearly unconfined jurisdiction and

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6. *See, e.g., BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996) (examining whether punitive damage are "grossly excessive" in violation of due process protections); *Michigan v. Clifford*, 464 U.S. 287, 291 (1984) (examining warrantless and nonconsensual searches under the Fourth and Fourteenth Amendments); *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (implementing due process analysis of administrative procedures prior to termination of fundamentally protected rights); *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (examining factors relating to due process right to a speedy trial).

jeopardizes fairness to all participants in the modern international economy.

D. Due process requires great care before imposing jurisdiction over foreign parties due to unique risks to fairness and international relations.

The Texas courts properly considered the unique burdens on foreign parties resulting from Texas jurisdiction. Both this Court and the Texas Supreme Court pay special attention to international cases. *Asahi*, 480 U.S. at 114 ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."); *Guardian Royal*, 815 S.W.2d at 229. The important state and federal interests in controlling judicial systems should be respected.

III.

THE COURT SHOULD KEEP CONSTITUTIONAL REQUIREMENTS FOR JURISDICTION AND *FORUM NON CONVENIENS* SEPARATE.

The courts can distinguish between the Due Process Clause's jurisdictional requirements and the doctrine of *forum non conveniens*. While the principles may seem superficially similar, the two legal principles grow from different roots and serve different purposes. They are not interchangeable, and the Court should reject the Petitioner's conflation of these two concepts.[7]

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7. The Petitioner's reliance on a dissenting opinion by a Texas Supreme Court justice and a law review commentator does not prove that any or all courts view *Asahi* and *forum non conveniens* as "one in the same." Pet. at 13. Courts appreciate the difference. (Cont'd)

Forum non conveniens is a common law doctrine grounded in the courts' inherent power, likely dating back to Scottish law. *American Dredging Co. v. Miller,* 510 U.S. 433, 449 (1994). The doctrine applies only if jurisdiction exists, and focuses on a comparison of available fora and competing interests of both plaintiffs and defendants. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 255-56 (1981); *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504 (1947). To contrast, the fair play and substantial justice analysis inherent in the Due Process Clause is a constitutional doctrine, which primarily focuses on whether the forum chosen by the plaintiff has power to hear the case at all. *International Shoe,* 326 U.S. at 316; *cf. Quackenbush v. Allstate Ins. Co.,* 116 U.S. 706, 1712, 1724 (1996) (noting the "distinct historical pedigree" of *forum non conveniens* and the *Burford* abstention doctrine). Moreover, *forum non conveniens* is essentially a procedural device that may be overcome by constitutional or statutory law, while no state legislature may extend jurisdiction in violation of the constitutional liberty interests.[8]

(Cont'd)
Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 575 (2d Cir. 1996) ("[i]ssues of convenience pertinent to a § 1404 motion and the related common law concept of *forum non conveniens* should not be conflated with the due process concerns that are the focus of the *Asahi* test") (citing *Foster-Miller, Inc. v. Babcock & Wilcox Canada,* 46 F.3d 138, 150 (1st Cir. 1995); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1501 (5th Cir. 1993) (Johnson, J., concurring in part), *cert. denied,* 510 U.S. 1044 (1994)).

8. For example, this Court has held that a state may preclude the application of *forum non conveniens* in state court admiralty cases. *American Dredging,* 510 U.S. at 453, 454 n.4 (stating that a state court may chose to "burden its judiciary with litigation better handled elsewhere"). Similarly, the state law of *forum non conveniens* governs state court cases under the Federal Employers' Liability Act, (Cont'd)

The outward similarity of factors applied under *Asahi* and *forum non conveniens* simply reflects overlapping characteristics of any location-based examination. Neither the Constitution nor the doctrine of *forum non conveniens* maintains an exclusive monopoly on fairness inquiries. Indeed, similar considerations of "the interests of justice" also surface when evaluating motions to transfer venue under federal and Texas law.[9] However, these comparable appearances do not mean these legal principles are clones.

The due process inquiry and *forum non conveniens* complement each other, rather than repeat one another. Exercising jurisdiction in a forum, when viewed in isolation, may pass the minimum guaranteed threshold of constitutionally-protected fairness. However, maintaining that jurisdiction, when

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(Cont'd)
45 U.S.C.A. § 56 (West 1986). *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 5 (1950). After the Texas Supreme Court's conclusion that the doctrine of *forum non conveniens* was unavailable in Texas for certain cases, announced in *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991), the Texas legislature amended the venue statute to expressly permit such dismissals. *See* Tex. Civ. Prac. & Rem. Code § 71.051(a) (West 1998) (providing that courts may decline to exercise jurisdiction over non-United States residents under *forum non conveniens*).

9. *See* 28 U.S.C.A. § 1404(a) (West 1993) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action. . . ."); Tex. Civ. Prac. & Rem. Code § 15.002(b) (West 1998) ("For the convenience of the parties and witnesses and in the interest of justice, a court may transfer an action. . . ."); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-31 (1988) (discussing factors weighed under § 1404(a)); *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964) (stating that motions to transfer venue must be decided according to "individualized, case-by-case considerations of convenience and fairness").

viewed in the context of the entire situation and potential alternative fora, may not be warranted.

The Petitioner's proposal for removing fairness from the due process inquiry and relying on the augmented application of the *forum non conveniens* doctrine would jeopardize defendants' liberty interests and potentially prejudice plaintiffs. The application of *forum non conveniens* is highly discretionary and reviewed only for an abuse of discretion. *Piper Aircraft*, 454 U.S. at 257. However, the application of constitutional legal principles is reviewed *de novo*. *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F.3d 147, 150 (3d Cir. 1996). Accordingly, it would be more difficult for plaintiffs to overcome the deferential abuse of discretion standard of review on appeal if *forum non conveniens* replaced the constitutional jurisdictional inquiry.

CONCLUSION

At their heart, the Due Process Clause and its implementation by this Court permit jurisdiction when it is fair and reasonable, and prevent jurisdiction when it is unfair. Texas has stated that jurisdiction is not fair here. This Court should do the same.

Respectfully submitted,

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